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No. 251

In the Supreme Court of the United States

OCTOBER TERM, 1958

ATLANTIC CITY ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion and findings of fact of the Court of Claims (Pet. 1a-16a) are reported at 161 F. Supp. 811.

JURISDICTION

The order of the Court of Claims dismissing taxpayer's petition was entered on May 7, 1958. (Pet. 1a, 11a.) Taxpayer's petition for a writ of certiorari was filed on August 4, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether the Court of Claims erred in holding that the premium paid by a public utility corporation on the redemption of its preferred stock was not a "dividend" within the meaning of Section 26(h) of the Internal Revenue Code of 1939, and hence did not qualify for the dividends-paid credit allowed by that provision of the Code.

STATUTE INVOLVED

The various statutory provisions involved are set forth in the Government's brief in opposition in *General Public Utilities Corp.* v. *United States* (No. 226, this Term) which, as explained below, is incorporated by reference here.

STATEMENT

The material facts, as found by the Court of Claims (Pet. 12a-16a), may be summarized as follows:

Taxpayer is, and in 1944 was, a public utility. On May 15, 1944, taxpayer redeemed from public stockholders 26,283 shares of its 6% cumulative preferred stock, par value $100 per share, for $120 per share, or a total of $3,199,692.42. The premium of $20 per share, aggregating $525,660, was paid out of, and charged to, taxpayer's earned surplus. At the same time, taxpayer purchased for cancellation 30,592 shares of the same 6% preferred stock from its parent, the American Gas & Electric Company. This effected the retirement of the entire issue of the

6% preferred stock. No portion of the redemption premium of $525,660 paid to public stockholders represented cumulative and unpaid dividends for any prior year.

No action having been taken within the prescribed time on taxpayer's refund claim, in which taxpayer first asserted that the redemption premium should qualify for dividends-paid credit, this litigation ensued.

ARGUMENT

Section 26(h)(1) of the 1939 Code provides a special credit against the income of "a public utility" for "dividends paid during the taxable year on its preferred stock." It is undisputed here that taxpayer is "a public utility", and that the stock which it redeemed in 1944 was "preferred stock" within the meaning of Section 26(h). The dispositive question is whether the premium paid on redemption constituted "dividends paid" within the meaning of the statute. The Court of Claims answered this question in the negative, for the reasons given in its opinion (Pet. 1a-11a) entered on May 7, 1958. Being confronted with precisely the same question in *General Public Utilities Corp.* v. *United States*, the Court of Claims, without opinion, dismissed the taxpayer's petition therein on the same date that it decided the instant case, invoking its decision herein as controlling. The Court of Claims was also confronted with the same question, as one of two issues presented in *Idaho Power Co.* v. *United States*, 161 F. Supp. 807. The court's opinion in that case, also

entered on May 7, 1958, again relied upon its decision in the instant case as controlling the issue common to both cases.

A petition for a writ of certiorari was filed by taxpayers in *General Public Utilities Corp.* v. *United States* (No. 226, this Term) on July 26, 1958; by taxpayer in *Idaho Power Co.* v. *United States* (No. 236, this Term) on July 30, 1958; and by taxpayer in the instant case on August 4, 1958. In its brief in opposition heretofore filed in *General Public Utilities*, the Government has set forth in full its reasons why this Court should not grant certiorari with respect to the issue common to that case, *Idaho Power*, and the instant case.[1] Those reasons are equally conclusive here.

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[1] Nor is there any merit to the additional contention of the taxpayer in this case (Pet. 4) that the decision below is in conflict with the holding of this Court in *Commissioner* v. *Estate of Bedford*, 325 U.S. 283, 292, as to the applicability of 1939 Code Section 115(a) to Section 112(c)(2). Rather, the decision below, as shown by the Government's brief in opposition in *General Public Utilities*, is in complete accord with the holdings of this Court in *Helvering* v. *Credit Alliance Corp.*, 316 U.S. 107, and *Hellmich* v. *Hellman*, 276 U.S. 233, and of other courts as to the interrelation of Section 115(a) and (c) with respect to dividends-paid and dividends-received credits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1958.

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